

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS**

THOMAS E. CAMPBELL,)	
)	
Plaintiff,)	
)	
vs.)	Civil No. 16-cv-425-JPG-CJP
)	
NANCY A. BERRYHILL, Acting)	
Commissioner of Social Security,)	
)	
Defendant. ¹)	

MEMORANDUM and ORDER

In accordance with 42 U.S.C. § 405(g), plaintiff Thomas E. Campbell, represented by counsel, seeks review of the final decision of the Commissioner of Social Security denying his application for Disability Insurance Benefits (DIB) and Supplemental Security Income (SSI) benefits pursuant to 42 U.S.C. § 423.

Procedural History

Plaintiff applied for disability benefits in November 2012, alleging disability beginning on November 2, 2011. After holding an evidentiary hearing, ALJ Christopher Hunt denied the application in a decision dated November 21, 2014. (Tr. 22-37). The Appeals Council denied plaintiff's request for review, and the ALJ's decision became the final agency decision subject to judicial review. (Tr. 1).

¹ Nancy A. Berryhill is now the Acting Commissioner of Social Security. See, *Casey v. Berryhill*, 853 F.3d 322 (7th Cir. 2017). She is automatically substituted as defendant in this case. See Fed. R. Civ. P. 25(d); 42 U.S.C. §405(g).

Plaintiff has exhausted his administrative remedies and has filed a timely complaint in this court.

Issues Raised by Plaintiff

Plaintiff raises the following issues:

1. The ALJ failed to consider whether he was entitled to a closed period of disability.
2. The credibility determination was erroneous because the ALJ did not consider the interrelationship between plaintiff's pain and his anxiety.

Applicable Legal Standards

To qualify for DIB or SSI, a claimant must be disabled within the meaning of the applicable statutes.² For these purposes, “disabled” means the “inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.” 42 U.S.C. §§ 423(d)(1)(A) and 1382c(a)(3)(A). A “physical or mental impairment” is an impairment resulting from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques. 42 U.S.C. §§ 423(d)(3) and 1382c(a)(3)(C).

² The statutes and regulations pertaining to Disability Insurance Benefits (DIB) are found at 42 U.S.C. § 423, et seq., and 20 C.F.R. pt. 404. The statutes and regulations pertaining to SSI are found at 42 U.S.C. §§ 1382 and 1382c, et seq., and 20 C.F.R. pt. 416. As is relevant to this case, the DIB and SSI statutes are identical. Furthermore, 20 C.F.R. § 416.925 detailing medical considerations relevant to an SSI claim, relies on 20 C.F.R. Pt. 404, Subpt. P, the DIB regulations. Most citations herein are to the DIB regulations out of convenience.

“Substantial gainful activity” is work activity that involves doing significant physical or mental activities, and that is done for pay or profit. 20 C.F.R. §§ 404.1572.

Social Security regulations set forth a sequential five-step inquiry to determine whether a claimant is disabled. The Seventh Circuit Court of Appeals has explained this process as follows:

The first step considers whether the applicant is engaging in substantial gainful activity. The second step evaluates whether an alleged physical or mental impairment is severe, medically determinable, and meets a durational requirement. The third step compares the impairment to a list of impairments that are considered conclusively disabling. If the impairment meets or equals one of the listed impairments, then the applicant is considered disabled; if the impairment does not meet or equal a listed impairment, then the evaluation continues. The fourth step assesses an applicant's residual functional capacity (RFC) and ability to engage in past relevant work. If an applicant can engage in past relevant work, he is not disabled. The fifth step assesses the applicant's RFC, as well as his age, education, and work experience to determine whether the applicant can engage in other work. If the applicant can engage in other work, he is not disabled.

Weatherbee v. Astrue, 649 F.3d 565, 568-569 (7th Cir. 2011).

Stated another way, it must be determined: (1) whether the claimant is presently unemployed; (2) whether the claimant has an impairment or combination of impairments that is serious; (3) whether the impairments meet or equal one of the listed impairments acknowledged to be conclusively disabling; (4) whether the claimant can perform past relevant work; and (5) whether the claimant is capable of performing any work within the economy, given his or her age, education and work experience. 20 C.F.R. §§ 404.1520; *Simila v. Astrue*, 573 F.3d 503, 512-513 (7th Cir. 2009); *Schroeter v. Sullivan*, 977 F.2d 391, 393 (7th Cir. 1992).

This Court reviews the Commissioner’s decision to ensure that the decision is supported by substantial evidence and that no mistakes of law were made. It is important to understand that the scope of judicial review is limited. “The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive. . . .” 42 U.S.C. § 405(g). Thus, this Court must determine not whether plaintiff was, in fact, disabled, but whether the ALJ’s findings were supported by substantial evidence and whether any errors of law were made. See, *Books v. Chater*, 91 F.3d 972, 977-78 (7th Cir. 1996) (citing *Diaz v. Chater*, 55 F.3d 300, 306 (7th Cir. 1995)). This Court uses the Supreme Court’s definition of substantial evidence, i.e., “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Richardson v. Perales*, 402 U.S. 389, 401 (1971).

In reviewing for “substantial evidence,” the entire administrative record is taken into consideration, but this Court does not reweigh evidence, resolve conflicts, decide questions of credibility, or substitute its own judgment for that of the ALJ. *Brewer v. Chater*, 103 F.3d 1384, 1390 (7th Cir. 1997). However, while judicial review is deferential, it is not abject; this Court does not act as a rubber stamp for the Commissioner. See, *Parker v. Astrue*, 597 F.3d 920, 921 (7th Cir. 2010), and cases cited therein.

The Decision of the ALJ

ALJ Hunt followed the five-step analytical framework described above. He determined that Mr. Campbell had not worked at the level of substantial gainful activity since the alleged onset date and that he was insured for DIB through March 31, 2014.³

The ALJ found that plaintiff had severe impairments of status-post two surgeries to the lumbosacral spine, left hip cyst, and anxiety. He found that these impairments do not meet or equal a listed impairment.

ALJ Hunt concluded that plaintiff had the residual functional capacity to perform work at the sedentary exertional level, limited to occasional climbing of ramps and stairs; no climbing of ropes, ladders and scaffolding; occasional balancing, stooping, kneeling, crouching; no crawling; and no concentrated exposure to environmental irritants, temperature extremes or poor ventilation. He should be allowed to stand at the work station for a few minutes every hour without leaving the work station and while remaining on tasks. His mental limitations restricted him to simple, routine and repetitive tasks.

Based on the testimony of a vocational expert (VE), the ALJ determined that plaintiff could not do his past work, but he could perform other jobs which exist in significant numbers in the national and local economies, and, therefore, he was not disabled.

³ The date last insured is relevant only to the claim for DIB.

The Evidentiary Record

The Court has reviewed and considered the entire evidentiary record in formulating this Memorandum and Order. The following summary of the record is directed to the points raised by plaintiff.

1. Agency Forms.

Plaintiff was born in February 1972 and was 39 years old on the alleged date of onset. (Tr. 261). He had worked as a laborer in construction and masonry restoration. (Tr. 291).

In 2013, plaintiff was trying to work on light duty for Precision Industrial. He took pain medication to make it through the day. He had anxiety attacks. (Tr. 313-319). The agency considered this to be an “unsuccessful work attempt.” (Tr. 336).

2. Evidentiary Hearing.

Plaintiff was represented by counsel at the evidentiary hearing in October 2014. (Tr. 47).

Plaintiff had three children, ages 10, 8 and 5. His wife worked as an LPN. (Tr. 53). He testified that he had back pain beginning in 1995. (Tr. 50). He had a heart attack on the alleged date of onset, November 2, 2011. He had stents placed. He has also been treated for low back pain, anxiety and high blood pressure. He also had pain in his left hip and groin. (Tr. 54-56).

He took Alprazolam (Xanax) for anxiety three times a day, prescribed by his primary care physician. The ALJ sked him how anxiety kept him from working. He replied, “I don’t know, your honor, if it’s the anxiety or the mixture of the pain. I can’t pinpoint it.” (Tr. 65-66).

A vocational expert (VE) also testified. The ALJ asked the VE to assume a hypothetical question which corresponded to the RFC assessment. The VE testified that this hypothetical person could not do plaintiff's past work, but he could do sedentary jobs which exist in significant numbers, such as charge account clerk, table worker, and document preparer. (Tr. 70-72).

3. Medical Records.

Plaintiff was hospitalized following a heart attack on November 2, 2011. He was diagnosed with coronary artery disease. He underwent cardiac catheterization and placement of a stent. (Tr. 534-537). A second stent was placed on December 2, 2011. (Tr. 763). He requested and was prescribed Xanax for anxiety at that time. (Tr. 785). In April 2012, his cardiologist, Dr. Laura Gruen, noted that he was doing well and had no anginal symptoms. His hypertension was adequately controlled. (Tr. 776-777).

On October 12, 2012, plaintiff complained to primary care physician Robert Ayres, M.D., that his back pain had gotten much worse in the last couple of weeks and was radiating down both legs. (Tr. 719). An MRI of the lumbar spine showed a large disc protrusion/extrusion at L3/4 causing severe central canal stenosis. (Tr. 511).

Nicholas Poulos, M.D., a neurosurgeon, performed a total left laminectomy and discectomy at L3-4 in December 2012. (Tr. 900). In February 2013, plaintiff had completed a course of physical therapy. He still had some pain in his low back and into his left buttock, but not down his leg. He felt like he was "gradually getting worse." Dr. Poulos prescribed Voltaren and Robaxin and planned to reevaluate him in six weeks. If he were not getting better, the doctor

would consider discogenic work-up. Dr. Poulos released him to return to work as a mason. (Tr. 877).

Plaintiff returned to Dr. Poulos on April 11, 2013. He had not taken Voltaren or Robaxin because of the cost. His primary care physician had prescribed Vicodin and Gabapentin. Dr. Poulos noted that his preoperative left leg pain had resolved, but he was developing progressive spinal pain. Dr. Poulos again recommended trying Voltaren and Robaxin. The note states “full time job postponed to end of the month.” (Tr. 879). On May 9, 2013, plaintiff reported that his primary care physician had instructed him to stop taking Voltaren, a nonsteroidal anti-inflammatory drug, because he had rectal bleeding. He had been taking Vicodin and Flexeril. He had good and bad days with pain in the low back and buttock. Dr. Poulos wrote that “patient cannot work.” He noted that “We need to quickly change the direction of this case.” He recommended a lumbar CT discogram, noting that the disc herniation at L3-4 was “massive” and he suspected that the disc space was mechanically incompetent. (Tr. 882). In July 2013, following the discogram, Dr. Poulos determined that he had a post-discectomy syndrome with mechanically incompetent L3-4 disc space. He recommended decompression and internal fixation at L3-4 and L4-5. (Tr. 885).

Plaintiff called Dr. Poulos’ office in August 2013 to schedule the surgery. He was awaiting “his mother’s test results” and did not want to schedule it until the next week. In September, he said he would like to schedule it for November. (Tr. 1017-1018). The surgery was scheduled for November 12, 2013. On October 28, 2013, Dr. Poulos noted that plaintiff had

back pain radiating to his left buttock, at a level of 4 out of 10 on that date. Dr. Poulos ordered preoperative labwork and requested medical clearance for surgery from his cardiologist. (Tr. 1011-1016).

Plaintiff was admitted to the hospital through the emergency room on November 4, 2013, because of recurrent chest pain. Cardiac catheterization showed mild nonobstructive coronary artery disease. His stents were widely patent. Continued aggressive risk factor modification was recommended. (Tr. 1073-1077).

On November 7, 2013, Dr. Poulos' office cancelled the surgery because written medical clearance had not been received from the cardiologist. (Tr. 1009). On November 18, 2013, a member of the staff wrote a note stating that she talked with plaintiff and "surgery will need to be cancelled again ...11/22/13...on hold till after new year. He will call when medically ok." (Tr. 1007).

Dr. Gruen, the cardiologist, saw plaintiff in January 2014 for medical clearance for his back surgery. She noted that he was under stress at home and took Xanax as needed for anxiety attacks. He was "unable to be active due to his back pain." (Tr. 1067-1068).

Surgery was scheduled for February 4, 2014, but was cancelled because plaintiff had flu-like symptoms. (Tr. 1005).

Dr. Poulos performed the second back surgery on February 21, 2014. (Tr. 1026-1028). One week later, plaintiff reported that 80% of his preoperative pain was gone. (Tr. 1002). Dr. Poulos said he was unable to work until he was reevaluated. (Tr. 1004). On March 20, 2014, Dr.

Poulos noted he was wearing a back brace and a bone stimulator. He was cleared to come out of the brace but was to continue using the bone stimulator for four hours a day. He had bilateral sacral iliac tenderness. He was to begin physical therapy and was referred to pain management for a left SI injection. (Tr. 999). In June 2014, Dr. Poulos was beginning to see some early bone healing on x-rays. Plaintiff continued to wear an external bone stimulator. (Tr. 993). Dr. Poulos released plaintiff from his care on September 4, 2014. He noted that plaintiff had received two injections in his hip from another doctor and had much less pain in his groin. His spinal pain was 70% better and he was smiling and “looks like a completely different person compared to his preop persona.” (Tr. 990).

During the period October 12, 2012, to September 4, 2014, plaintiff’s primary care physician noted that plaintiff’s anxiety was associated with chronic pain. She prescribed Xanax. (Tr. 723, 794, 942).

Analysis

Plaintiff argues, correctly, that the ALJ failed to properly consider whether he was entitled to a closed period of disability from October 12, 2012, to September 4, 2014.

Plaintiff’s argument focuses on the period during which plaintiff was being treated for back pain. On October 12, 2012, plaintiff told his primary care physician that his back pain was getting much worse and pain was radiating down his legs. The next day, an MRI showed a large herniated disc causing severe central canal stenosis. As is detailed above, he had two back

surgeries over the next approximately fourteen months, and was not released by his surgeon until September 4, 2014.

The Commissioner suggests that plaintiff cannot now argue for a closed period because he did not amend his alleged onset date or ask the ALJ to consider a closed period. Doc. 32, p. 3. The Court rejects this position. The ALJ acknowledged in the first sentence of his decision that plaintiff had applied “for a period of disability and disability insurance benefits.” (Tr. 22).

“The law defines disability as the inability to do any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.” 20 C.F.R. § 404.1505(a). An applicant is entitled to a period of disability if he has “or had a disability as defined in § 404.150, and he was insured for disability “in the calendar quarter in which you became disabled, or in a later calendar quarter in which you were disabled.” 20 C.F.R. § 404.320(b).

Although the ALJ did not explicitly say so, his conclusion that plaintiff was not entitled to a period of disability must necessarily be premised on the belief that plaintiff was able to do some kind of full-time work for a substantial number of months between his first surgery in December 2012 and the time he was released by Dr. Poulos on September 4, 2014. It is difficult to identify those months.

The only hints given by the ALJ as to his thinking are his observation that Dr. Poulos released plaintiff to return to work by the end of February 2013, and his observation that plaintiff

“did allege a recurrence of intense back pain beginning in about May 2013, but it must not have been that debilitating because the second back surgery was put off until February 2014.” (Tr. 33).

It is true that Dr. Poulos released plaintiff to return to work as a mason on February 14, 2013. Plaintiff tried, unsuccessfully, to work at a light duty, part-time job through May 2013. (Tr. 313-319). The ALJ acknowledged that this was an “unsuccessful work attempt.” (Tr. 25). In light of later events, it is obvious that Dr. Poulos was overly optimistic about plaintiff’s ability to return to work as a mason at that time. By May 9, 2013, Dr. Poulos had reversed himself. On that date, he wrote, “patient cannot work.” (Tr. 882). Furthermore, the ALJ did not find that plaintiff was able to do his past work as a mason at any time after his alleged date of onset. Therefore, the fact that Dr. Poulos released plaintiff to return work as a mason in February 2013 is of little significance. Indeed, the ALJ did not find and the Commissioner does not now argue that plaintiff was actually capable of working as a mason from February to May 2013.

More importantly, the ALJ ignored relevant evidence in concluding that the delay in performing the second surgery shows that plaintiff’s pain was not debilitating. On May 9, 2013, Dr. Poulos suspected that the disc space was mechanically incompetent because the herniation had been “massive” and he recommended a lumbar CT discogram. (Tr. 882). It was not until July 2013, after a discogram had been done, that Dr. Poulos definitely recommended the second surgery. (Tr. 885). His notes make it plain he was not going to do the second surgery until the cardiologist had medically cleared plaintiff. Plaintiff was hospitalized for cardiac symptoms in

early November 2013. The surgery was scheduled for later that month, but was cancelled because written clearance had not been received from the cardiologist. When the cardiologist saw plaintiff in January 2014 to consider clearance for surgery, she noted that he was not able to be active because of back pain. The surgery was ultimately done in February 2014. Plaintiff then had physical therapy, wore a back brace, and used a bone growth stimulator. It was not until June 2014 that Dr. Poulos first saw early bone healing on x-rays. Plaintiff was not released from Dr. Poulos' care until September 4, 2014.

The ALJ's cavalier remark that plaintiff's back pain must not have been debilitating since surgery was put off until February 2014 ignores the evidence summarized above. There is also no indication that the ALJ considered plaintiff's increased anxiety associated with pain during this period.

There is no indication that the ALJ meaningfully considered whether plaintiff was unable to work at any full-time job for at least a twelve month period since his alleged date of onset. This was error requiring remand.

The Court wishes to stress that this Memorandum and Order should not be construed as an indication that the Court believes that plaintiff is disabled or that he should be awarded benefits. On the contrary, the Court has not formed any opinions in that regard, and leaves those issues to be determined by the Commissioner after further proceedings.

Conclusion

The Commissioner's final decision denying Thomas E. Campbell's application for social security disability benefits is **REVERSED and REMANDED** to the Commissioner for rehearing and reconsideration of the evidence, pursuant to sentence four of **42 U.S.C. §405(g)**.

The Clerk of Court is **DIRECTED** to enter judgment in favor of plaintiff.

IT IS SO ORDERED.

DATE: 7/31/2017

s/J. Phil Gilbert

J. PHIL GILBERT
U. S. DISTRICT JUDGE